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Supreme Court of the United States

OCTOBER TERM, 1993

TICOR TITLE INSURANCE COMPANY, *et al.*,

Petitioners,

—v.—

WALTER THOMAS BROWN and JEFFREY L. DZIEWIT,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN INSURANCE ASSOCIATION, CONTINENTAL CASUALTY COMPANY AND PACIFIC INDEMNITY COMPANY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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CONSENT OF PARTIES

Petitioners and respondents have consented to the filing of this brief, and their letters of consent are being filed separately herewith.

INTEREST OF *AMICI*: THE MASS-TORT LITIGATION CRISIS AND RULE 23(b)(1)(B) SETTLEMENTS

The American Insurance Association ("AIA") is a national trade organization representing some 254 companies writing property and casualty insurance throughout the United States.*

* These companies together write insurance totalling more than $60 billion in premiums annually. A substantial portion of AIA member companies' business is commercial liability insurance.

(footnote continued)

A number of these insurance companies face significant potential liability arising out of so-called "mass torts." Additional *amici* Continental Casualty Company and Pacific Indemnity Company are two insurers that have recently agreed in principle to pay in excess of $1.5 billion to create a settlement trust, in a Rule 23(b)(1)(B) class action, for the purpose of compensating more than 150,000 future asbestos personal-injury claimants. *Ahern* v. *Fibreboard Corp.*, Civil Action No. 6:93cv526 (E.D. Tex.).

Amici believe that the question presented by the instant case—whether the Due Process Clause *requires* that class members be afforded opt-out rights in *every* damages case brought under Rule 23—raises important social and public policy issues that are of utmost concern to both tort claimants and business, and to the judicial system as a whole.

Mass torts involve widespread personal injuries caused, for example, by asbestos, lead paint, birth-control devices, herbicides, pharmaceuticals and silicone breast implants. In recent years, the federal courts have begun to resolve mass-tort litigation through the use of "limited fund" class settlements pursuant to Rule 23(b)(1)(B), Fed. R. Civ. P.—a procedure that seeks to assure the equitable distribution to claimants of limited resources by bringing all claimants into a single class-action proceeding. *Amici* believe that the Ninth Circuit's decision, which suggests that each class member has an unqualified right to litigate his or her damages claims in a separate proceeding, unjustifiably casts doubt on the continued validity of such no-opt-out "limited fund" settlements.

As is set forth in detail below, preservation of the no-opt-out limited-fund class as a mass-tort settlement tool is of critical importance to mass-tort claimants, to mass-tort defendants and

The purposes of the AIA are to promote the economic, legislative and public standing of its members and of the insurance industry; to provide a forum for discussion of problems that are of common concern to its members; to keep members informed of regulatory and legislative developments; and to serve the public interest through appropriate activities, including the promotion of safety and security of persons and property.

their insurers, and to the courts themselves. Indeed, no other judicial mechanism developed to date guarantees as effectively the equitable treatment of injured claimants, while permitting defendants and insurers meaningfully to gauge and manage their mass-tort exposure. Rule 23(b)(1)(B) not only comports with due process but provides the best means of protecting the rights of future claimants by reducing transaction costs, assuring the preservation of resources for compensation, and alleviating the backlog in the courts. Accordingly, *amici* urge this Court to remove the doubt cast by the Ninth Circuit's decision upon the continued validity of the no-opt-out class action provisions of Rule 23.

I. The Mass-Tort Problem

Litigation arising out of mass torts now constitutes nothing less than a crisis—a crisis for claimants seeking compensation, for defendants facing such lawsuits, for their insurers, and for the judicial system itself.

The enormous volume of mass-tort cases is alone sufficient to hamper—in many instances, to foreclose—their effective management and fair adjudication. It has been estimated, for example, that there are approximately 100,000 asbestos-related personal-injury cases pending in the state and federal courts. *See In re Joint Eastern and Southern District Asbestos Litigation ("Johns-Manville")*, 129 B.R. 710, 746 (E. & S.D.N.Y. 1991), *vacated on other grounds*, 982 F.2d 721 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993). And for every asbestos case terminated in the federal system almost two new asbestos cases are filed. Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation (1991) ("Ad Hoc Committee Report") at 8.*

* Similar volumes of claims arise in other mass-tort contexts. In the Dalkon Shield intrauterine-device litigation, for example, the Fourth Circuit noted that there existed over 300,000 claims—raising the spectre of a like number of lawsuits absent class certification. *In re A.H.*

Exacerbating the effect of the sheer volume of mass-tort cases is their factual and legal complexity. " '[A] typical asbestos case involves a claim against an average of 20 defendants who file cross-claims against each other, a lengthy discovery process, including record searches and specialized medical exams . . . .' Thirty or more legal issues can be presented in the course of a single asbestos case." Ad Hoc Committee Report, *supra*, at 11 (quoting Deborah R. Hensler, *et al.*, *Asbestos in the Courts, The Challenge of Mass Toxic Torts* 28 (Rand Corporation Institute for Civil Justice 1985)).*

The volume and complexity of mass-tort litigation spell delay, often tragic delay, for the plaintiffs. The average disposition time of an asbestos case terminated in federal court in 1989 was 995 days. Arthur R. Miller & Price Ainsworth, *Resolving the Asbestos Personal-Injury Litigation Crisis*, 10 Rev. Litig. 419 (1991). During the pendency of one asbestos litigation, 448 of the original plaintiffs died. *Cimino*, *supra*, 751 F. Supp. at 651. "Under these circumstances, the principle of 'justice delayed is justice denied' has added meaning." Ad Hoc Committee Report, *supra*, at 12.

Further, legal fees and other "transaction costs" are unacceptably high in relation to the compensation ultimately made available to claimants. Looking once again to the asbestos con-

Robins Company, Inc., 880 F.2d 709, 741 (4th Cir.), *cert. denied*, 493 U.S. 959 (1989). In the Agent Orange class action, the class consisted of "several hundred thousand" soldiers who had been exposed to the herbicide. *In re "Agent Orange" Product Liability Litigation*, 996 F.2d 1425, 1428 (2d Cir. 1993).

* An example of this complexity is provided by *Cimino* v. *Raymark Industries, Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990), where the trial consumed 133 days of trial time and required the entry of 373 signed orders by the Court. Prior to trial 1,885 sets of interrogatories had been answered and 2,354 depositions taken, with an additional 800 depositions being taken during trial. Independent medical examinations were conducted of 1,400 plaintiffs. During the trial 271 expert witnesses and 292 fact witnesses testified, and 6,176 exhibits were received in evidence consisting of 577,000 pages of documents. *Id.* at 653.

text, one finds that of the billions of dollars spent to date on asbestos-related litigation only 39% has gone to the injured plaintiffs. James S. Kakalik, *et al.*, *Variation in Asbestos Litigation Compensation and Expenses* 91 (Rand Corporation Institute for Civil Justice 1984).* *See also, e.g.*, Robert H. Sand, *How Much is Enough? Observations in Light of the Agent Orange Settlement*, 9 Harv. Envtl. L. Rev. 283, 297-98 (1985).

As the costs of mass-tort litigation have exploded, the pool of resources available to compensate injured claimants has begun to evaporate, leading to a "race to the courthouse" to claim available funds. For example, asbestos litigation has to date brought about the bankruptcy or dissolution of no fewer than sixteen American companies.** Moreover, because many of the injuries in mass-tort cases result from insidious diseases that may take decades to manifest themselves, there is often a real threat that so-called "future" claimants—*i.e.*, victims whose injuries have not yet manifested themselves—will be left without any source of compensation. *See, e.g.*, Ad Hoc Committee Report, *supra*, at 34-35. This situation led the Ad Hoc Committee on Asbestos Litigation to observe (in words applicable today to a variety of mass torts):

> [W]ith the present rate of dissipation of the funds of defendant producers due to transaction costs, large verdicts, and multiple punitive damage awards, all resources

* Indeed, a more recent estimate placed the total received by asbestos plaintiffs at only 30 cents for every dollar expended in litigation. *See Johns-Manville*, *supra*, 129 B.R. at 749.

** These companies include: UNR Industries, Inc.; Johns-Manville Corporation; Amatex Corporation; Forty-Eight Insulations, Inc.; Pacor, Inc.; Standard Insulations, Inc.; Nicolet, Inc.; Raymark Industries, Inc.; Raytech Corporation; Hillsborough Holding Corporation; The Celotex Corporation; National Gypsum Company; Eagle-Picher Industries, Inc.; H.K. Porter Company, Inc.; Continental Products; and North American Asbestos Corporation. And Keene Corporation has recently instituted judicial proceedings seeking court-formulated procedures to stave off bankruptcy. *See Keene Corp.* v. *Fiorelli*, CV-93-2129 (E. & S.D.N.Y.).

> for payment of these claims will be exhausted in a few years. That will leave many thousands of severely damaged Americans with no recourse at all. Aggrieved citizens will further burden public finances for welfare and health care.

Ad Hoc Committee Report, *supra*, at 27.*

Finally, the burden that mass-tort litigation places on the judicial system is so substantial as to have an impact on *all* litigants. *See, e.g., Johns-Manville, supra*, 129 B.R. at 750 ("The large number of asbestos lawsuits pending throughout the country threatens to overwhelm the courts and deprive all litigants, in asbestos as well as other civil cases, of meaningful resolution of their claims."); *In re "Bendectin" Products Liability Litigation*, 102 F.R.D. 239, 240 n.3 (S.D. Ohio) (existing Bendectin docket alone would require 105 "Judge years" to try), *mandamus granted on other grounds*, 749 F.2d 300 (6th Cir. 1984). In the Eastern District of Texas, for example, an astounding 34.1% of civil case filings in 1990 were related to asbestos alone. Ad Hoc Committee Report, *supra*, at 8. Mass-tort cases, in sum, have the potential to swamp the courts, to the detriment of all citizens. *See generally, e.g., In re A.H. Robins, supra*, 880 F.2d at 726; *In re Joint Eastern and Southern District Asbestos Litigation ("Johns-Manville")*, 1991 U.S. Dist. LEXIS 7527, at 64-65 (E. & S.D.N.Y. May 16, 1991).

Noting this phenomenon, one recent commentator has written as follows:

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* Further, many still-solvent American companies have seen precious resources—financial and human—diverted from productive use to the defense of mass-tort litigation. For many of these companies, and their insurers, moreover, long-term planning has been rendered difficult or impossible: product-liability claims can continue to arise for many years—sometimes, for decades—after the manufacture of a product has ceased. And financing sources often become unavailable in the face of potentially enormous tort liability stretching out into the foreseeable future. In short, mass-tort litigation often cripples, where it does not kill, the corporate defendants involved.

> The asbestos cases provide the most dramatic and widespread example of a broader litigation crisis facing the nation's court system—dealing with mass tort cases. Mass accidents and mass exposures to toxic substances have engendered an avalanche of lawsuits, which threaten to bury state and federal court systems with thousands of repetitive claims. Besides asbestos, other notable examples of mass tort cases include those involving Agent Orange, the Dalkon Shield IUD, and Diethylstilbestrol (DES). . . . As American society becomes more complex and these types of actions grow more common, it is increasingly critical that courts apply some type of procedural device to handle mass tort cases efficiently.

Steve Baughman, Note, *Class Actions in the Asbestos Context: Balancing the Due Process Considerations Implicated by the Right to Opt Out*, 70 Tex. L. Rev. 211, 212 (1991) (footnotes omitted). *See also, e.g.*, Irving Panzer & Thomas Patton, *Utilizing the Class Action Device in Mass Tort Litigation*, 21 Tort & Ins. L.J. 560, 561 (1986) ("The public is crying out for better solutions to mass tort litigation than separate, redundant trials in thousands of related cases.").

II. The (b)(1)(B) "Limited Fund" Settlement Mechanism

In recent years, federal courts grappling with the mass-tort crisis have increasingly turned toward one potential solution to provide a more equitable means to resolve these massive litigations: no-opt-out "limited fund" settlements under Rule 23(b)(1)(B).* Such settlements allow courts (1) equitably to

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* *See, e.g., Johns-Manville, supra*, 982 F.2d at 738-39 (permitting use of Rule 23(b)(1)(B) no-opt-out class action for distribution of asbestos personal-injury settlement trust); *In re A.H. Robins, supra*, 880 F.2d at 741 (approving certification of limited-fund settlement class under Rule 23(b)(1)(B) in dispute between insurer and insured arising out of disputed liability for injuries caused by intrauterine device); *In re Silicone Gel Breast Implant Products Liability Litigation ("Mentor Corp.")*,

distribute among competing claimants the limited funds available from a given defendant, thereby eliminating the inequities that result from awarding such funds on a race-to-judgment basis; and (2) to reduce the legal fees and other transaction costs associated with repetitive individual litigations, thus increasing the funds available to compensate injured claimants.*

The no-opt-out feature of Rule 23(b)(1)(B) classes is essential to achieving each of these important goals. Indeed, to allow

MDL-926 (N.D. Ala. Sept. 10. 1993) (certifying Rule 23(b)(1)(B) limited-fund, no-opt-out settlement class of breast implant personal-injury claimants); *Ahern* v. *Fibreboard Corp.*, *supra* (E.D. Tex. Sept. 9, 1993) (provisionally certifying Rule 23(b)(1)(B) limited-fund, no-opt-out settlement class of future asbestos personal-injury claimants); *In re Joint Eastern and Southern District Asbestos Litigation ("Eagle-Picher")*, 134 F.R.D. 32, 35 (E. & S.D.N.Y. 1990) (conditionally certifying Rule 23(b)(1)(B) limited-fund, no-opt-out settlement class of future asbestos personal-injury claimants). *See also In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 291-92 (2d Cir. 1992) (affirming certification of Rule 23(b)(1)(B) limited-fund, no-opt-out settlement class of securities-fraud claimants), *cert. dism'd*, 113 S. Ct. 1070 (1993); *In re Granada Partnership Securities Litigation*, 803 F. Supp. 1236, 1244 (S.D. Tex. 1992) (certifying Rule 23(b)(1)(B) limited-fund, no-opt-out settlement class of claimants with claims of securities fraud, RICO violations and violations of state law); *In re United Energy Corp. Securities Litigation*, [1989 Tr. Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,376 (C.D. Cal. 1989) (certifying Rule 23(b)(1)(B) limited-fund, no-opt-out settlement class of securities-fraud claimants); *Bush* v. *Rewald*, [1986-1987 Tr. Binder] Fed. Sec. L. Rep. (CCH) ¶ 92,999 (D.Haw. 1986) (same).

* The initial question of whether or not to *certify* a class action, and in particular the difficulties inherent in certifying mass-tort class actions for litigation, as opposed to settlement, purposes, is beyond the scope of this brief. It should be noted, however, that the courts have sensibly applied a more relaxed standard to the certification of class actions in the settlement context. *See, e.g.*, *Bowling* v. *Pfizer, Inc.*, 143 F.R.D. 141, 158 (S.D. Ohio 1992); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 480 (S.D.N.Y. 1984); *see also Officers for Justice* v. *Civil Service Commission*, 688 F.2d 615, 633 (9th Cir. 1983); *cf. In re A.H. Robins, supra*, 880 F.2d at 740 ("If not a ground for certification *per se*, certainly settlement should be a factor, and an important factor, to be considered when determining certification.").

opt-outs in a Rule 23(b)(1)(B) limited-fund class action would completely defeat the purposes of the class-action mechanism to equitably and efficiently resolve large numbers of claims on a unitary basis. As explained by Professors Robinson and Abraham:

> Permitting individuals to pursue separate claims [against a limited fund] runs the risk of an inequitable distribution of compensation if early claimants draw down the fund disproportionately, or perhaps exhaust it altogether. If . . . due process does not entitle one plaintiff's claim to preempt another's, there can be no due process right to opt out in this situation.

Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 Va. L. Rev. 1481, 1506 (1992). This is particularly true in mass-tort situations, which often involve unknown potential future claimants whose injuries—absent a mandatory class-action device—may not become manifest until after any fund available to compensate them has been exhausted. *See In re "Agent Orange," supra*, 996 F.2d at 1435 (future claimants' rights protected not by opt-out right, but by "ensuring that they receive vigorous and faithful vicarious representation"). "The societal cost of permitting opt-outs for the purpose of individual adjudications in these inherent class action situations could be enormous . . . ." 1 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 1.22, at 1-51 (1992).

Further, the no-opt-out feature is often of cardinal importance to defendant manufacturers who hope to quantify their liability and thus assure their business survival, and to their insurers, who may be willing to resolve coverage disputes in exchange for the certainty provided by a no-opt-out settlement. As the Fifth Circuit has noted:

> [A]llowing objectors to opt out would discourage settlements because class action defendants would not be inclined to settle where the result would likely be a settlement applicable only to class members with

questionable claims, with those having stronger claims opting out to pursue their individual claims separately.

Kincade v. *General Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981).

The recent *Fibreboard* "futures" settlement* well illustrates the utility of the no-opt-out (b)(1)(B) approach. There, a financially hard-pressed former asbestos manufacturer and its two insurers have reached agreement in principle with class representatives to create and fund a $1.5 billion-plus settlement trust to redress *all* future asbestos-related personal-injury claims against the manufacturer. A *sine qua non* of the settlement was that it provide both even-handed compensation of injured claimants and predictability for Fibreboard and its insurers—a result that has been achieved through the use of a no-opt-out (b)(1)(B) settlement class. The massive *Fibreboard* "futures" settlement, in other words, could not have been achieved had it been thought necessary to permit "opt-outs" and thereby lose the ability to bind all future claimants to the settlement. *See Ahern*, *supra*, Findings of Fact and Conclusions of Law (E.D. Tex. Sept. 28, 1993).

Continued viability of the no-opt-out "limited fund" approach used in *Fibreboard* and other recent settlements is thus critical to obtaining the fair and expeditious disposition of mass-tort litigation generally.

* * *

While the Ninth Circuit was not considering a Rule 23(b)(1)(B) "limited fund" settlement, its broad language could be read to require the right to opt out of *any* class settlement involving money damages. Accordingly, absent this Court's intervention, the utility of the "(b)(1)(B)" settlement as a device to resolve mass-tort claims is likely to be significantly undermined.

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* *Ahern* v. *Fibreboard*, *supra*. *See* Peter Kerr, *Two Insurers Settle on Asbestos*, N.Y. Times, Aug. 31, 1993, at D1; Greg Steinmetz & Marilyn Chase, *Fibreboard Sets Asbestos Accord With Insurers*, Wall Street Journal, Aug. 31, 1993, at A3.

SUMMARY OF ARGUMENT*

The Ninth Circuit erred to the extent its ruling extended this Court's decision in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), to require that opt-out rights be given to plaintiffs in class actions properly certified under Rule 23(b)(1) or 23(b)(2), Fed. R. Civ. P.

First, due process does not require that class plaintiffs be given the right to opt out of the inherently unitary class actions certified under Rules 23(b)(1) and (b)(2) generally. The holding in *Shutts*—which by its terms was limited to class actions "wholly or predominately for money judgments," 472 U.S. at 811 n.3, *i.e.*, actions of the type created in 1966 by Rule 23(b)(3)—is simply not applicable to the traditional class actions certified under Rules 23(b)(1) and (b)(2). *Shutts* cannot be read to undercut the longstanding rule, expressed in *Hansberry* v. *Lee*, 311 U.S. 32 (1940), that absent members of a class properly certified under the latter Rules are bound by a judgment with respect to that class, so long as their interests have been adequately represented. Moreover, this well-established rule holds true regardless of whether the issue is analyzed under the general procedural due process approach of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), or under the case law establishing the due-process requisites of personal jurisdiction.

Second, any opt-out requirement recognized in the case before this Court should not extend to limited-fund class

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* To avoid unnecessary duplication, *amici* will not add to Petitioners' argument—with which *amici* agree—that the opt-out right recognized in *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), does not apply in federal-court class actions. *Amici* write separately, however, to stress a separate limitation on the holding in *Shutts* that applies to both federal-court and state-court class actions: the *Shutts* opt-out right, *amici* submit, is limited to "common question" class actions of the type created by Rule 23(b)(3) in 1966; it has no application to traditional, inherently unitary class actions—*i.e.*, those today certified under Federal Rules 23(b)(1)-(b)(2) or analogous state-law provisions.

actions certified under Rule 23(b)(1)(B). To require opt-outs in such class actions would entirely defeat the very purpose for which class-action treatment is afforded under that Rule: *viz.*, to prevent individual lawsuits brought by some class members from impairing the interests of other class members. Limited-fund situations thus present a uniquely compelling case for not requiring opt-out rights.

ARGUMENT

The Ninth Circuit appears to have held that "minimal procedural due process" requires the extension of opt-out rights to absent class members in *any* class action involving monetary claims—including actions (like the case at bar) certified under subdivisions (b)(1) and (b)(2) of Federal Rule 23. *Brown* v. *Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992).* The decision is wrong, at least insofar as it speaks to class actions certified under Rules 23(b)(1)-(b)(2) (or their state-law analogues), and should be reversed.

In holding that class plaintiffs must be accorded opt-out rights whenever they have damages claims, the Ninth Circuit has essentially declared unconstitutional subdivisions (b)(1) and (b)(2) of Rule 23: those provisions were designed to provide class members no opt-out rights, and they contain no "damages" exception. *See* Rule 23(c)(3); Advisory Committee's Note to Rule 23, 39 F.R.D. 98, 105 (1966); 7B Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice & Procedure* § 1789 (1986).

As the sole support for its holding, the Ninth Circuit relied upon a single, out-of-context phrase from this Court's opinion in *Shutts*, *supra*, 472 U.S. at 812, stating that the Due Process

* The Ninth Circuit's holding might also be read to apply only to classes involving "substantial" damages claims. *See Brown*, *supra*, 982 F.2d at 392. In either event, the lower court plainly did not limit its holding to the class of cases addressed in *Shutts*, *supra*, 472 U.S. at 811 n.3 —*i.e.*, class actions "predominately" for money damages.

Clause requires "that an absent plaintiff be provided with an opportunity to [opt out]." *See Brown*, *supra*, 982 F.2d at 392. This view of *Shutts* misreads both that case and the requirements of the Due Process Clause.

I. DUE PROCESS DOES NOT REQUIRE THE RIGHT TO OPT OUT OF THE INHERENTLY UNITARY CLASS ACTIONS CERTIFIED UNDER RULES 23(b)(1) AND 23(b)(2).

As noted, the Ninth Circuit appears to have read *Shutts* as holding that opt-out rights are an indispensable due-process incident of *any* class action involving monetary claims. That interpretation, however, betrays a clear misunderstanding of the decision in *Shutts*, which was explicitly limited to the problems raised by class actions "wholly or predominately for money judgments"*—*i.e.*, "common question" class actions of the sort first created in 1966 by Rule 23(b)(3). The long-established validity of the traditional no-opt-out class actions encompassed within Rules 23(b)(1) and (b)(2) is completely unaffected by *Shutts*.

A. *Shutts* does not undercut the longstanding rule that absent members of (b)(1) and (b)(2) classes are bound by a class judgment if their interests have been adequately represented.

In extending *Shutts*' pro-opt-out ruling *beyond* actions "wholly or predominately for money judgments," to cover *all* class actions with any monetary relief component, the Ninth

* "Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, such as those seeking equitable relief." *Shutts*, *supra*, 472 U.S. at 811-12 n.3. *Compare* Advisory Committee's Note, *supra*, 39 F.R.D. at 102 (Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages").

Circuit ignored the fundamental distinction, recognized in both *Shutts* and Rule 23, between the traditional class actions encompassed within Rules 23(b)(1)-(b)(2) and the "common question" class action created in 1966 by Rule 23(b)(3). *See, e.g.*, Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 Harv. L. Rev. 356, 394 (1967) (contrasting "the more 'standard' class actions of (b)(1) and (2)" with "the difficult terrain of (b)(3)"). Nothing written in *Shutts* about such Rule 23(b)(3)-type class actions casts doubt on the long-established rule in traditional class actions that adequate representation, without more, satisfies the requirements of due process. *Hansberry*, *supra*, 311 U.S. at 41-43.

The mandatory (*i.e.*, no-opt-out) action under Rules 23(b)(1) and (b)(2) is the modern-day version of the traditional class action long recognized in Anglo-American law. It is necessitated by, and limited to, special circumstances in which numerous claims implicate a joint interest such that "inconsistency, prejudice, or inequity . . . would result to persons similarly situated *in the absence of a unitary adjudication of their common claims*." 1 *Newberg on Class Actions*, *supra*, § 1.20, at 1-48 (emphasis added). A prime example of the traditional "unitary" class action is that of numerous claims against a "limited fund." *See* Advisory Committee's Note, *supra*, 39 F.R.D. at 101.

In contrast, the "common question" actions governed by Rule 23(b)(3) are an innovation of the 1966 revision of the Federal Rules, combining what are essentially individual actions as to which "class-action treatment is not as clearly called for as in [(b)(1) and (b)(2) actions], but it may nevertheless be convenient and desirable." Advisory Committee's Note, *supra*, 39 F.R.D. at 102.

Mandatory class actions are predominantly equitable in nature. *See* 1 *Newberg on Class Actions*, *supra*, § 1.19 at 1-46. This is obvious in suits under Rule 23(b)(2) seeking "final injunctive relief or corresponding declaratory relief." It is equally true as to limited-fund cases under subdivision (b)(1)(B): "though they involve money claims individually," such cases are in essence actions "to allocate pro rata an available fund that is insufficient to pay all claims," and therefore "are equitable in nature." 1 *Newberg on Class Actions*, *supra*, § 1.19 at 1-47. *See also, e.g.*, *Johns-Manville*, *supra*, 129 B.R. at 832 (holding *Shutts* opt-out rights inapplicable in limited-fund context).

The mandatory class action of Rules 23(b)(1)-(b)(2) derives from an equitable mandatory class mechanism, the Seventeenth-Century English "bill of peace." *See* Arthur R. Miller & David Crump, *Jurisdiction & Choice of Law in Multistate Class Actions after Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 39-40 (1986). *See also* Zechariah Chafee, *Some Problems of Equity* 200-01 (1950) ("Class suits began as an offshoot of bills of peace with multiple parties"); 7A Charles A. Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 1751 at 8 (1986) ("It was the English bill of peace that developed into what is now known as the class action."). The bill of peace was a chancery action to obtain essentially declaratory and injunctive relief resolving the potential claims of a large group of people. *See* Douglas Laycock, *Modern American Remedies* 346-47 (1985).

Class actions binding on class members who are not joined as parties to the action have been recognized in this country at least since *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288 (1854), in which representatives of a plaintiff class of some 1500 Methodist ministers residing in various jurisdictions sued to vindicate rights in a common fund. This Court upheld the maintenance of the suit on a representative basis, on the grounds that in cases involving "a common interest or a common right," a "court of equity permits a portion of the parties in interest to represent the entire body, *and the decree binds all of them the same as if all were before the court.*" *Id.* at 302-03 (emphasis added).

In the ensuing 140 years, this Court has consistently accepted the binding *res judicata* effect of judgments in traditional class actions provided that the absent class members were adequately represented. *See, e.g., Hartford Life Ins. Co.* v. *Ibs*, 237 U.S. 662 (1915); *Hartford Life Ins. Co.* v. *Barber*, 245 U.S. 146, 149 (1917); *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U.S. 356 (1921); *Sovereign Camp of the Woodmen of the World* v. *Bolin*, 305 U.S. 66, 78-79 (1938).

In short, long prior to *Shutts* this Court's decisions had made clear that traditional, unitary class actions—*i.e.*, no-opt-out actions of the type within subdivisions (b)(1) and (b)(2) of modern Rule 23—were a "recognized exception" to normal *in personam* requirements. *Hansberry, supra*, 311 U.S. at 40-41. As summarized in *Hansberry*, *adequacy of representation*, without more, is the key to binding absent class members by a class judgment:

> It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present.

Id. at 42-43.

The rules of procedure applicable in the federal courts have long reflected this traditional rule. In the years prior to the adoption of the Federal Rules of Civil Procedure, Federal Equity Rule 38 (adopted in 1912), under which "[l]imited fund and other no opt-out class actions were recognized," provided that " 'absent parties could be bound by . . . judgments pursuant to this provision.' " 1 *Newberg on Class Actions, supra*, § 1.09 at 1-24 (quoting *Johns-Manville, supra*, 129 B.R. at 804).

Similarly, with the 1938 promulgation of the Federal Rules of Civil Procedure and the merger of law and equity, original Rule 23 preserved the binding nature of traditional class actions. In addition, Rule 23 for the first time extended the

class-action mechanism to actions at law, and in doing so created a new category of non-binding class action. The Rule thus distinguished among three types of actions: "true," "hybrid," and "spurious." The first two of these categories were mandatory—*i.e.*, they encompassed the traditional binding, no-opt-out class actions recognized by the case law; the third, "spurious," category, was essentially a permissive joinder device, binding class members only if they affirmatively opted *into* the class. 1 *Newberg on Class Actions, supra*, § 1.09 at 1-26–1-27; 3B James W. Moore & John E. Kennedy, *Moore's Federal Practice* ¶ 23.31[1], at 23-235 (1992).

Finally, in the 1966 amendments to the Federal Rules, the "true" and "hybrid" categories were preserved in slightly modified form in the no-opt-out class actions of Rules 23(b)(1)-(b)(2); "spurious" actions were transformed into the present (b)(3) "common question" class action. *See* Marvin E. Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 43 (1967); 3B *Moore's Federal Practice, supra*, ¶ 23.31[1], at 23-235; *see also* 1 *Newberg on Class Actions, supra*, § 1.09 at 1-25 ("Antecedents of the modern limited fund class action may be found in the hybrid class suit [under prior Rule 23].").

The 1966 rule, in short, created a new type of binding class action by replacing the opt-*in* requirement for "spurious" actions with the current opt-*out* scheme applicable to Rule 23(b)(3) classes. *See* Rule 23(c)(2). Most importantly for present purposes, however, the new rule preserved the longstanding *Hansberry* principle that in *traditional* class actions (*i.e.*, actions under the new Rules 23(b)(1)-(b)(2)) adequate representation, without more, is sufficient to bind absent class members.

In upholding the innovation of the 23(b)(3)-type class action—and in expressly "intimat[ing] no view" as to actions *not* of that type (*i.e.*, *not* "wholly or predominately for money damages"), *Shutts, supra*, 472 U.S. at 811 n.3*—*Shutts* could

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* *Cf. Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177 n.14 (1974) (expressly limiting holding "to class actions maintained under subdivision (b)(3)").

not have intended to cast doubt upon this well-established rule. As a leading authority on class actions has written, "[i]t is highly unlikely that the Supreme Court would have invalidated [Rules 23(b)(1)-(b)(2)] without expressly doing so." 1 *Newberg on Class Actions*, *supra*, § 1.19 at 1-49.

Indeed, far from denigrating the long-settled adequacy-of-representation standard governing the *res judicata* effect of traditional class actions, *Shutts* affirmatively *endorsed* that standard:

> *Hansberry* v. *Lee* . . . explained that a "class" or "representative" suit was an exception to the rule that one could not be bound by judgment *in personam* unless one was made fully a party in the traditional sense. . . . As the Court pointed out in *Hansberry*, . . . [t]he absent parties would be bound by the decree *so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest.*

Shutts, *supra*, 472 U.S. at 808 (emphasis added). And the Court has renewed this endorsement post-*Shutts*. *See Martin* v. *Wilks*, 490 U.S. 755, 761-62 & n.2 (1989) (citing *Hansberry*, *supra*, as having recognized that a nonparty will be bound by a judgment where "*his interests [are] adequately represented by [a party] with the same interests*") (emphasis added). *See also*, *e.g.*, 1 *Newberg on Class Actions*, *supra*, § 1.22 at 1-54.

Shutts, in short, rather than invalidating the traditional no-opt-out class actions encompassed within Rules 23(b)(1)-(b)(2), in fact reaffirms the adequacy-of-representation reasoning that justifies the binding nature of such actions. *Shutts*' language stating that opt-out rights are a necessary due-process incident of non-traditional (b)(*3*)-type class actions simply has no application to the other subdivisions of the Rule.

B. Mandatory class actions under Rules 23(b)(1) and (b)(2) provide absent class members with the process that is due.

This Court's due process case law confirms the validity of the rule, *see Hansberry*, *supra*, 311 U.S. at 41-43, that adequacy of representation, without more, suffices to bind absent class members to the judgment in a traditional class action brought under Rules 23(b)(1)-(b)(2) or a state-law analogue. This is true regardless of whether the issue is analyzed under the general procedural due process approach of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), or under the case law establishing the due-process requisites of personal jurisdiction.

Any attack on the validity of a Federal Rule of Civil Procedure must rebut a heavy presumption in favor of the Rule's constitutionality. *See Hanna* v. *Plumer*, 380 U.S. 460, 471 (1965).* Moreover, the well-established history of mandatory class actions is of great significance in determining what constitutes "due process of law," whether one views that historical practice as dispositive, *see*, *e.g.*, *Burnham* v. *Superior Court*, 495 U.S. 604, 619 (1990) (opinion of Scalia, J.), or merely as a "significant indicato[r] of what we as a people regard as fundamentally fair and rational." *Schad* v. *Arizona*, 501 U.S. ____, ____, 111 S. Ct. 2491, 2503 (1991) (plurality opinion); *accord Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 17-18 (1991).

1. *Mathews* v. *Eldridge*

The familiar test of *Mathews* balances:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the prob-

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* Indeed, in *Shutts* itself the Court rested its pro-opt-out decision in part on the argument that a more stringent "opt-in" requirement would necessitate the invalidation of a portion of Rule 23. *Shutts*, *supra*, 472 U.S. at 813-14.

> able value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, supra, 424 U.S. at 335. Where, as here, the issue concerns "disputes between private parties rather than between an individual and the government," the third *Mathews* factor is modified so that "principal attention" is paid to the interests of other affected private parties "with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections." *Connecticut* v. *Doehr*, 501 U.S. ____, ____, 111 S. Ct. 2105, 2112 (1991).

All three *Mathews* factors weigh in favor of the conclusion that opt-out rights are not constitutionally required in Rule 23(b)(1) and (b)(2) class actions. As to the first prong, *Shutts* itself recognizes that the "private interest" of an absent class member in avoiding out-of-state adjudication of his or her cause of action is considerably less than the interest of a defendant haled into a distant forum to defend himself or herself "upon pain of a default judgment." *Shutts, supra*, 472 U.S. at 809. "The burdens placed by a State upon an absent class-action plaintiff are not of the same order of magnitude as those it places upon an absent defendant." *Id.* at 808.

Second, the "risk of error" with which the next *Mathews* prong is concerned is significantly mitigated in class actions because class members' interests are protected by Rule 23's stringent requirements designed to ensure adequate representation of those interests. *See Martin, supra*, 490 U.S. at 761-62 & n.2 (adequate representation in class action permits "exception to the general rule" that every person is entitled to his or her own day in court); *Shutts, supra*, 472 U.S. at 808 (citing *Hansberry, supra*, 311 U.S. at 41, for the proposition that absent class members will be bound "so long as the named parties adequately

represented the absent class and the prosecution of the litigation was within the common interest"); *Hansberry, supra*, 311 U.S. at 42-43; *see also Kincade, supra*, 635 F.2d at 507-08 (no-opt-out (b)(2) class settlements do not violate due process, given adequate representation and other Rule 23 guarantees); *cf. Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319 (1950).*

While adequate representation is required under all subdivisions of Rule 23, the *Mathews* "risk of error" in precluding opt-outs will generally be less in actions qualifying for certification under Rules 23(b)(1) and (b)(2), on the one hand, than in those qualifying only under Rule 23(b)(3), on the other. This is so because of the greater degree of "cohesiveness" or "unity" that characterizes (b)(1) and (b)(2), as distinct from (b)(3), classes. *See, e.g. Walsh* v. *Great Atlantic & Pacific Tea Company, Inc.*, 726 F.2d 956, 963 & n.1 (3d Cir. 1983) ("Rule 23(b)(3) classes are less cohesive, and must abide by more stringent due process constraints."); *Holmes* v. *Continental Can Co.*, 706 F.2d 1144, 1157 (11th Cir. 1983) ((b)(3) classes are "pregnant with potential tensions and interest-antagonisms between class members"); 3 Herbert Newberg & Alba Conte, *Newberg on Class Actions* § 16.17, at 16-95 (1992). Given this interdependence of interests among class members in (b)(1) and (b)(2) class actions, there is logically little to be gained from the standpoint of due process in permitting such class members to exclude themselves from the class.

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* Moreover, where a class action is *settled*—as is true of both the case at bar and the typical mass-tort limited-fund class action—notice is given to the class regardless of the nature of the claims involved. Fed. R. Civ. P. 23(e). This notice is particularly potent and meaningful in terms of its due process value, in that it notifies class members of the proposed *outcome* of the class action, rather than merely making them aware of the pendency of the litigation generally. Should a member of the class be dissatisfied with the tendered settlement terms, he or she has a right to be heard and object. Accordingly, in the context of a settlement the "risk of error" with which the second *Mathews* prong is concerned is further reduced.

The third *Mathews* factor, focusing on the private and societal cost of requiring additional procedures, is particularly compelling in the case of mandatory class actions, in which class members' interdependent interests may be substantially impaired by the actions of opt-outs. As explained by Mr. Newberg:

> Because class actions under Rule 23(b)(1) or (2) are designed to avoid inconsistent adjudications or prejudice arising from separate suits by individuals similarly situated under special circumstances affecting groups of persons in common, they are analogous to interpleader or quasi-in-rem suits in which equitable circumstances dictate the need for a unitary adjudication regardless of the individual consent of the parties affected. The societal cost of permitting opt-outs for the purpose of individual adjudications in these inherent class action situations could be enormous, compared to the modest gains at best in constitutional terms for additional individual procedural rights. Thus, the opt-out due process right for class members in common question [*i.e.*, Rule 23(b)(3)] class actions, which *Shutts* held is tantamount to implied consent to jurisdiction in the absence of exercising such exclusion right after notice, would also seem to be an unnecessary element of procedural due process in class suits that are traditionally maintained on a no-opt-out basis, regardless of the individual consent of class members.

1 *Newberg on Class Actions*, *supra*, § 1.22, at 1-51. *See also* Advisory Committee's Note, *supra*, 39 F.R.D. at 100 ("The difficulties which would be likely to arise if resort were had to separate actions by or against the individual members of the class [in Rule 23(b)(1) actions] furnish the reasons for, and the principal key to, the propriety and value of utilizing the class-action device.").

Because "[b]y definition, it is impossible to resolve separately individual claims involving common rights or limited funds," Miller & Crump, *supra*, 96 Yale L.J. at 40, the third prong of the *Mathews* balance weighs heavily in favor of the constitutionality of no-opt-out classes in such cases. "[T]he marginal gains from affording [the] additional procedural safeguard" are "outweighed by the societal cost of providing such a safeguard." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 320-21 (1985); *accord Mathews*, *supra*, 424 U.S. at 348; Henry J. Friendly, *Some Kind of Hearing*, 123 U. Pa. L. Rev. 1267, 1276 (1975).

The considerable cost of providing an opt-out right in actions under Rules 23(b)(1) and (b)(2) contrasts with the minimal difficulty of providing such a right in "common question" class actions of the type at issue in *Shutts*. In such Rule 23(b)(3)-type actions, "class-action treatment is not as clearly called for . . . but it may nevertheless be convenient and desirable." Advisory Committee's Note, *supra*, 39 F.R.D. at 102. In these class actions, which typically combine related but separable damages claims, claims of class members who opt out may be adjudicated without prejudicing the rights of third parties or otherwise destroying the viability of class adjudication.

In short, applying the *Mathews* test establishes that Rule 23(b)(1) and (b)(2) class actions provide class members with all the protection the Due Process Clause requires.

2. Personal-jurisdiction cases

Even if personal-jurisdiction doctrine were to be regarded as requiring an analysis separate from that of *Mathews*, the traditional rule that class actions are an *exception* to generally applicable *in personam* requirements, *Hansberry*, *supra*, 311 U.S. at 40-41, comports with the requirements of due process. Indeed, *Hansberry*'s discussion of class actions in which absent parties could be bound without offending due process specifically included cases in which joinder of parties was "difficult

or impossible" because "some are not within the jurisdiction." *Id.* at 41.

Because a traditional common-right or common-fund class action under Rules 23(b)(1)-(b)(2) (or a state-law analogue) is inherently unitary, it would make no sense to examine the "minimum contacts" of each individual class member; rather, the forum chosen by a class plaintiff must be permitted to adjudicate the entire case, provided that it has a reasonable connection with the case *as a whole*.

Thus, in *Mullane* v. *Central Hanover Bank & Trust Co.*, *supra*—decided five years *after International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945)—this Court rejected a personal-jurisdiction challenge by nonresident beneficiaries of a New York trust (whose claims against both the trust and the trustee were being foreclosed by a New York proceeding) because the interest in obtaining a unitary and final adjudication of trust-related matters "can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." *Mullane*, *supra*, 339 U.S. at 313-14.*

In other words, in the case of a traditional unitary class action of the type brought under Rules 23(b)(1)-(b)(2), so long as the forum has some reasonable relationship to the case as a whole there necessarily exists a sufficient " 'relationship among the [litigants], the forum, and the litigation,' " *Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770, 775 (1984) (quoting *Shaffer* v. *Heitner*, 433 U.S. 186, 204 (1977)), "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, *supra*, 326 U.S. at 316 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)).

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* Although not technically a class action, *Mullane* closely resembled a class suit in that the claims of numerous absent beneficiaries, many residing out-of-state, were adjudicated on a representative basis. *See id.* at 319.

In the present traditional class-action context, the sufficiency of this relationship between the case and the forum is to be measured by a version of the test set forth in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 292 (1980), for measuring the "minimum contacts" between an individual *defendant* and the forum—*i.e.*, by balancing the burden on the out-of-state parties whose rights are being adjudicated (here, the absent members of a plaintiff class) against "the forum State's interest in adjudicating the dispute"; the interests of *other* members of the plaintiff class in "obtaining convenient and effective relief"; "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies." *Id.*

In applying this analysis to class actions, as this Court explained in *Shutts*, any burden on absent plaintiffs must be seen as minimal, and largely obviated by the protections provided by class-action procedures. *Shutts*, *supra*, 472 U.S. at 808-14. Balanced on the other side is the forum's interest in adjudicating the action, which incorporates the interests of defendants, other plaintiffs, and "the interstate judicial system" in achieving unitary relief—all of which weigh most heavily in actions under subdivisions (b)(1) and (b)(2). For this reason, the ultimate personal-jurisdiction inquiry—whether it is "reasonable" to adjudicate the affected party's rights in a given forum, *World-Wide Volkswagen*, *supra*, 444 U.S. at 292—is plainly satisfied in mandatory class actions under Rules 23(b)(1)-(b)(2) so long as there is a reasonable connection between the forum and the action as a whole.*

* * *

In view of the longstanding validity of traditional no-opt-out class actions; the basic distinction between mandatory and

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* To the extent that there may be other fora with *more* significant connections to the action, such venue-related concerns may be dealt with through the usual remedies of a transfer pursuant to 28 U.S.C. § 1404, or, in state court, a dismissal under the doctrine of *forum non conveniens*.

"common question" class actions recognized both historically and in the Federal Rules; the due process calculus under *Mathews*; and the clear precedent of *Hansberry*, *Shutts* cannot be read as finding Rules 23(b)(1) and (b)(2) in violation of the Due Process Clause.* The Ninth Circuit has simply misread *Shutts*.

II. ANY OPT-OUT REQUIREMENT RECOGNIZED IN THIS CASE SHOULD NOT EXTEND TO CLASS ACTIONS CERTIFIED UNDER RULE 23(b)(1)(B).

Even if the Court should be inclined to affirm the decision below, *amici* respectfully urge the Court to make clear that its decision does not reach the issue of limited-fund actions under Rule 23(b)(1)(B). Such actions and the settlements they promote present a uniquely compelling case for not requiring opt-out rights, a case that should not be foreclosed in an action not involving a (b)(1)(B) class.**

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* For cases upholding mandatory class actions under Rules 23(b)(1)-(b)(2), or similar state provisions, against due process attack, see *Nottingham Partners* v. *Dana*, 564 A.2d 1089 (Del. 1989); *In re Jackson/Lockdown MCO Cases*, 107 F.R.D. 703 (E.D. Mich. 1985); *Kincade*, *supra*, 635 F.2d 501; *Robertson* v. *National Basketball Ass'n*, 556 F.2d 682 (2d Cir. 1977); *Wetzel* v. *Liberty Mut. Ins. Co.*, 508 F.2d 239, 255-57 (3d Cir.), *cert. denied*, 421 U.S. 1011 (1975); *see also Bell* v. *American Title Ins. Co.*, 277 Cal. Rptr. 583, 594-55 (Cal. App. 1991) (following *Nottingham Partners*).

** The class action that underlies this case, *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 815 F.2d 695 (3d Cir. 1987) (mem. op.), *cert. denied*, 485 U.S. 909 (1988), was *not* a Rule 23(b)(1)(B) limited-fund action. Rather, the district court certified a class under Rules 23(b)(1)(A) and 23(b)(2) because "there was serious risk that different courts would fashion different and incompatible means of restructuring the title insurance industry, and that the relief provided by the settlement was *primarily* injunctive." *In re Real Estate Title and Settlement Servs. Antitrust Litig.*, 869 F.2d 760, 764 (3d Cir.), *cert. denied*, 493 U.S. 821 (1989) (emphasis added) (quoting portion of the original district court order). The settlement in the case was "hybrid"—*i.e.*, it resolved both a claim for prospective injunctive relief and a claim for retrospective monetary damages. *Id.* at 768.

In class actions of the sort at bar, essentially separate damages claims may appropriately be swept within the mandatory class framework of Rules 23(b)(1)-(b)(2) because they are ancillary to a unitary *non*damages claim. *See* 1 *Newberg on Class Actions*, *supra*, § 1.22 at 1-51 n.188. In contrast, the individual damages claims in Rule 23(b)(1)(B) limited-fund class actions are not ancillary to some other relief that necessitates unitary class-action treatment; rather, the equitable apportionment of the damages claims *themselves* is what makes unitary treatment necessary.

To allow opt-outs from Rule 23(b)(1)(B) classes would completely defeat the purposes of this class-action mechanism, and would significantly impair the chances of settling mass-tort actions. As one district court has put it, "unless limited fund class actions are mandatory 'large numbers of plaintiffs could opt out and continue to exhaust the limited fund through the filing of their own lawsuits.' " *Johns-Manville*, *supra*, 129 B.R. at 832 (quoting *Waldron* v. *Raymark Industries, Inc.*, 124 F.R.D. 235, 237 (N.D. Ga. 1989)). Thus, the notion of opt-out rights in a limited-fund "mandatory class 'besides being oxymoronic, is contrary to the very purpose for which a Rule 23(b)(1)(B) class is meant to serve.' " *Johns-Manville*, *supra*, 129 B.R. at 832 (quoting *Waldron*, *supra*, 124 F.R.D. at 238 n.1); *cf. In re A.H. Robins*, *supra*, 880 F.2d at 746 (to permit "claimants who are seeking actually to promote their own interests largely at the expense of the other claimants to frustrate a class certification in [a mass-tort] case is unthinkable").

For this reason,

> even the most consistent advocates of the traditional individual method of adjudication recognized that limited fund situations represent special circumstances in which the loss of individual control is justified . . . . When a

> limited fund exists, the individual's interest in controlling his or her claim is outweighed by the interest of each class member in receiving an equitable share of the limited funds available.

Steven L. Schultz, *Mass Torts: In re Joint Eastern and Southern District Asbestos Litigation; Bankrupt and Backlogged—A Proposal for the Use of Federal Common Law in Mass Tort Class Actions*, 58 Brooklyn L. Rev. 553, 596 (1992).

Thus, Rule 23(b)(1)(B) class actions present the strongest possible justification—even as compared with other traditional class actions—against requiring an opt-out right under the Due Process Clause. Under the third *Mathews* v. *Eldridge* prong, which measures the "burdens that the additional or substitute procedural requirement would entail," *Mathews*, *supra*, 424 U.S. at 335, the potentially drastic consequences of permitting opt-outs in (b)(1)(B) actions makes for a uniquely compelling case against such opt-outs. Similarly, from a personal-jurisdiction standpoint, in a limited-fund case "the nexus between the fund, the claimants, and the action supports the exercise of jurisdiction over claimants even against their will." Miller & Crump, *supra*, 96 Yale L.J. at 52.

In short, in view of the pressing need for unitary treatment of Rule 23(b)(1)(B) cases, "[a] construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified." *Mullane*, *supra*, 339 U.S. at 313-14. Thus, although *amici* believe that the Ninth Circuit erred in deciding the instant case, *amici* also believe that it is of crucial importance, if this Court should choose to affirm the judgment below, that the Court not cast doubt upon the continuing validity of mandatory class actions under Rule 23(b)(1)(B).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the judgment below and reaffirm the constitutionality of no-opt-out class actions pursuant to subdivisions (b)(1) and (b)(2) of Federal Rule of Civil Procedure 23.

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